

Exhibit A

COPY

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUME

COURT CAUSE NO. 2011-67305

FEDERAL DEPOSIT INSURANCE) IN THE DISTRICT COURT
 CORPORATION AS RECEIVER)
 FOR FRANKLIN BANK, S.S.B.)
 Plaintiff,)
 VS.) HARRIS COUNTY, TEXAS
 MORGAN STANLEY & COMPANY, LLC,)
 f/k/a MORGAN STANLEY & CO. INC.,)
 Defendant.) 151ST JUDICIAL DISTRICT

MOTION FOR RECONSIDERATION

On the 29th day of September, 2014, the
 following proceedings came on to be heard in the
 above-entitled and numbered cause before the Honorable
 Mike Engelhart, Judge Presiding, held in Houston,
 Harris County, Texas.

Proceedings reported by computer-aided
 transcription/stenograph machine.

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1 P R O C E E D I N G S

2 09/29/2014 (At the bench, on the record)

3 THE COURT: This is 2011-67305, FDIC
4 versus Morgan Stanley. All right. So, 75 pages later
5 worth of briefing on the motion to reconsider, I have
6 read the motion, I have read the response, I have read
7 the reply. I have read the CTS case. I have read the
8 Guaranty case, and I have read Nomura II. And my
9 ruling is unchanged as to the applicability -- or
10 whether the extender statute preempts the statute of
11 repose and statute -- and/or statute of limitations,
12 first.

13 I am less certain as to whether to allow
14 the interlocutory appeal. Previously I did not. It's
15 fair to say that I stated in that order, I cited the
16 Fifth Circuit CERCLA case. Is that BNSF?

17 MR. HOLTON: Yes, sir.

18 THE COURT: And then I said let's see
19 the CTS case --

20 MR. HOLTON: Yes, sir.

21 THE COURT: -- very prophetically. And
22 that was, of course, then went up to the Supreme Court,
23 and they clip it. So now we have Sam Sparks in Austin,
24 I think, or San Antonio.

25 MR. HOLTON: Austin.

1 MR. MISHKIN: Austin, I believe.

2 THE COURT: Who -- well, all right, I'm
3 just going to say that I don't agree with his analysis.
4 But it's not a -- it's not a throwaway -- it's not a
5 two-page order that, you know, that he goes into some
6 depth. I don't think that that position is off the
7 wall or completely unreasonable. I think that on both
8 -- between Nomura II and Judge Sparks' ruling it's a
9 lot of how many angels can dance on the head of a pin
10 kind of stuff.

11 While I think the overwhelming majority,
12 well-reasoned authority is consistent with what I ruled
13 and with Nomura II, even after CTS, I can allow for the
14 possibility that the local courts of appeals don't
15 always agree with me.

16 So my question is, before I rule on that
17 issue is, what does that mean for us going forward?
18 For example, one of the things that I wrote in the
19 previous order and we've talked about and you-all have
20 talked about in your respective papers is that only two
21 of the four claims pending before the Court might be
22 affected by a reversal, right?

23 R. HOLTON: Yes, sir.

24 THE COURT: And dismissal, A.

25 B, a lot of the discovery has been done

1 in this case. C, I want to hear about whether you
2 think we can press forward while this interlocutory
3 appeal is pending or why we could not. I'm not
4 inclined to allow it to stall the case. I think we can
5 work on dual tracks if necessary.

6 And one of the things I put in the order
7 last time was that it seemed, at the time at least,
8 that this was not an issue -- a ruling by the court of
9 appeals in Texas was not going to -- I think I used the
10 term log jam -- make a log jam of these pending cases
11 under Texas law, or that are pending in Texas. I was
12 not aware, at least, but not consciously aware of the
13 Guaranty matter in front of Judge Sparks.

14 MR. HOLTON: It probably was pending,
15 Judge, but nor was I, I think.

16 THE COURT: So the question is where
17 does it get us, and will it slow us down? Does it have
18 to slow us down? You know -- and is it really worth
19 doing it in an interlocutory basis, you know, or can it
20 be something that is addressed posttrial because,
21 again, it only affects two of, I guess, the four
22 claims?

23 MR. MISHKIN: Your Honor, if I could
24 speak to that. I think just as a preliminary matter, I
25 would note that Judge Stanton's decision in the

1 Southern District of New York has also come down on the
2 side of Judge Sparks. So it's more than his authority
3 on that issue. So I think there's clearly a
4 substantial basis for disagreement of opinion at this
5 point.

6 In terms of material advancement, we do
7 think that there would be material advancement.
8 Although two of the four certificates would remain, the
9 issues are going to become a lot more simplified
10 because -- in particular because one of the two
11 certificates that would be out of the case is the only
12 securitization that Morgan Stanley itself sponsored and
13 created and with that comes a host of factual and
14 expert issues including about the process that Morgan
15 Stanley goes through to do a securitization. Those
16 issues are going to be out of the case. So it's going
17 to be substantially streamlined. I think there is a
18 benefit, in terms of the remaining discovery. I think
19 some of that discovery is going to be substantially
20 streamlined as a result of that reduction. And
21 certainly the issues at trial, Your Honor, would be
22 streamlined if those two certificates are out of the
23 case.

24 THE COURT: Why?

25 MR. MISHKIN: Because the evidence that

1 the jury would have to hear is going to be much more
2 limited. We're not going to have to get into issues of
3 a process by which Morgan Stanley creates these
4 certifications, we're not going to have to get into all
5 of the excessive process that Morgan Stanley goes
6 through in terms of its diligence when it's in that
7 particular posture.

8 And there's also far fewer loans that
9 are at issue at that point. More than half of the
10 loans that under (inaudible) the certificates would be
11 out of the case if these two certificates are out. And
12 so I think you have a much more -- I think you have a
13 much more streamlined, simplified proceedings at that
14 point.

15 MR. HOLTON: Thank you, Your Honor.
16 From our perspective, Your Honor, we think that
17 certainly the discovery that's pending should go
18 forward regardless of whether Your Honor (inaudible) --

19 THE REPORTER: I'm sorry. I could not
20 hear you.

21 MR. HOLTON: We think that the discovery
22 that is going on right now with a current deadline of
23 October 24th should continue. We are in the midst of
24 fact and expert discovery. We said no reason why that
25 shouldn't continue no matter what the Court rules with

1 respect to whether there should be an interlocutory
2 appeal and at least briefing on summary judgment
3 motions should go forward as well so that in the event
4 at any time the Court would decide to stay as much as
5 possible will have been done in advance of, say, a
6 trial.

7 In regards to the one security point
8 that he makes, it's true that some of the issues would
9 be narrowed. Obviously, we have claims on four
10 certificates and we would press forward with the other
11 two. And although there are some intricacies that
12 might go out of the case as a result of elimination of
13 that one certificate, pretty much all the issues
14 presented remain, Judge. And the case, of course,
15 would still be in the posture to go forward and we
16 think that it should do so.

17 THE COURT: Tell me about Judge
18 Stanton's in the Southern District of New York. Is it
19 just like Judge Sparks' or does it take a different
20 tack or what?

21 MR. MISHKIN: Judge Stanton's opinion, I
22 believe we wrote a -- probably perhaps while you didn't
23 see it, Judge, it came down after we filed our brief
24 and we sent a letter brief to the Court the following
25 day -- the following business day, which I think was

1 the day after Labor Day. Judge Stanton --

2 THE COURT: Yeah, I didn't see it. Go
3 ahead.

4 MR. MISHKIN: But Judge Stanton's
5 opinion is almost devoid of analysis, Your Honor.
6 Judge Sparks' opinion is certainly more thoughtful. I
7 think Judge Stanton's opinion is approximately 12 pages
8 long, 5 pages of which are block quotations of the CTS
9 case and a couple of pages of which are explanations of
10 what's gone on before. There's very little that Judge
11 Stanton adds to what CTS says. And, of course, we
12 think that what he does say is wrong. I think there's
13 no comparing his decision to Judge Sparks' decision in
14 terms of his thoughtfulness and, perhaps, its
15 persuasiveness.

16 Although we think that Judge Sparks'
17 decision suffers from a fundamental defect as well,
18 rendering it not appropriate to be filed, as the Court
19 evidently has already concluded and we certainly agree
20 with that.

21 MR. MISHKIN: Your Honor, could I
22 respond briefly on Judge Stanton's opinion?

23 THE COURT: Okay. Very briefly because
24 I've already ruled on that issue. I'm just more
25 interested from the standpoint if there was yet another

1 angle that he was taking.

2 MR. MISHKIN: I think it's consistent
3 with Judge Sparks' opinion. He has a portion of the
4 opinion where he talks about why the purposes of the
5 FDIC extender statute would be furthered, even under an
6 interpretation where statutes of repose are not
7 affected. And so I think that's very consistent with
8 Judge Sparks' decision but I think it's worth a read
9 for that portion of the decision, Your Honor.

10 And I think it's also notable that it's
11 in the context of the same extender provision. So
12 between Judge Stanton and Judge Sparks you now have a
13 situation where all courts that have looked at the FDIC
14 extender statute provision since CTS have all come out
15 in Morgan Stanley's favor on this.

16 THE COURT: Well, that's not true about
17 Nomura II, or is that a different --

18 MR. MISHKIN: They address different
19 extender statutes, Your Honor. And I agree they're
20 very, very similar and they are certainly -- that
21 there's certainly authority that needs to be looked at
22 and we think they were wrongly decided. But I do think
23 it's notable that all of the courts that have looked
24 specifically at our provision here have come down in
25 Morgan Stanley's favor.

1 MR. HOLTON: As long as we're counting
2 cases, Judge, there's also a decision from the
3 Honorable Denise Cote in the same district that we
4 mention in our papers where she interprets one of the
5 other similar statutes and also cites the Nomura II. I
6 think she says a finely written opinion that she
7 follows to a great extent, so --

8 THE COURT: That's N-o-m-u-r-a. And
9 then Roman numeral II.

10 MR. HOLTON: Yes, sir.

11 So, Judge, I think what you said the
12 last time really applies this time to the interlocutory
13 appeal, which you said that the great majority of
14 well-reasoned opinions -- or well-reasoned decisions
15 were on the side of the FDIC and there's nothing about
16 Judge Sparks' decision or certainly Judge Stanton's
17 decision that changes that in any way.

18 The thoughtful, authoritative decision
19 is the Nomura II. Judge Stanton offers very little
20 analysis. Judge Sparks, unfortunately, decides he's
21 not going to follow CTS really at all. He continues to
22 follow the Burlington decision, the reasoning that is
23 profoundly different than the CTS court's reasoning and
24 he seemed to make his conclusion as to the FDIC
25 extender statute that's really just based on the wrong

1 analysis at this point in time. And we think clearly
2 that the CTS analysis would apply to lead to the
3 conclusion that this Court has already drawn.

4 THE COURT: All right. I think there's
5 enough water under the bridge that it's time to let the
6 First or Fourteenth decide. But it is my fervent
7 intent to not slow down this case as it moves towards
8 to trial.

9 So I'm going to sign an order that
10 you're welcome to prepare that points out -- that says
11 you may take the interlocutory appeal, that it's not
12 this Court's intent to stay any discovery or motion for
13 other motion practice and it intends to proceed to
14 trial at the current trial date.

15 If by chance you've argued and we're
16 just waiting on an opinion and we need to push the
17 trial, you know, 30 days or so, and hopefully get an
18 opinion from the court of appeals, we can address that
19 later. But it is my intent to go forward.

20 MR. MISHKIN: Thank you, Your Honor.

21 THE COURT: Okay.

22 MS. HOCHMUTH: Your Honor, may I raise
23 one quick housekeeping issue?

24 THE COURT: Yes.

25 MS. HOCHMUTH: The FDIC filed a motion

1 to exclude expert evidence and there's actually hearing
2 next Monday on that motion.

3 THE COURT: Uh-huh.

4 MS. HOCHMUTH: To that motion the FDIC
5 attached an expert report that was deemed confidential.
6 The parties have signed an agreed order to redact that
7 and take that out of the public record so it would just
8 be viewed by you, not by the public. On Friday we
9 filed a letter agreement and then I brought in a copy
10 of the proposed order that we filed.

11 THE COURT: Did this come up the other
12 day and I -- it can be withdrawn. Which is different
13 than sealing it under Rule 76a. Right? So I'm happy
14 to sign that as long as you understand that it is -- I
15 don't know -- if I sign an order striking something or
16 allowing something to be withdrawn, how is it treated
17 in the file? Do you know?

18 THE CLERK: I do not know. I just know
19 when they do the seal and that's all I know.

20 THE COURT: My understanding is that --
21 well, I believe that I can seal -- not seal. I can
22 allow it to be struck or withdrawn by agreement, at
23 least. But, you know, the danger is, of course, that a
24 court -- that generally you're supposed to follow
25 Rule 76a. But I think if everybody agrees that it be

1 withdrawn, the impact of that is that it is not part of
2 the Court's record. As opposed to something that is
3 sealed is part of the Court's record, it's just not
4 visible to the public.

5 So, for example, if this were appealed
6 -- I can't imagine that this case would get appealed --
7 but if it were appealed, then it wouldn't go up to the
8 court of appeals because it wouldn't be part of the
9 Court's record.

10 So you would need a separate agreement,
11 if it's not already in there, that contemplates that it
12 would be by agreement, an appendix, or something that
13 would go up to the court of appeals, then you would
14 file the appropriate motion there that it not be
15 disclosed or something like that.

16 MR. HOLTON: Thank you for that
17 explanation, Your Honor. I think based on that, we
18 probably have a little more talking to do with our
19 opposing counsel, but I suspect we'll be able to nail
20 that down in a couple of days.

21 THE COURT: So do you understand the
22 distinction I'm making?

23 Rule 76a is a rule that says that after
24 notice to the public -- I'm probably not telling you --
25 you may or may not know this, but I'm sure you have

1 something similar in New York. After notice to the
2 public, the Court can seal certain types of things so
3 they're not available to the public. The notice and
4 hearing provision is so that if the press or somebody
5 else wanted access to it, there's a presumption that
6 the Court's files are open to the public. Right? So
7 that's 76a. Separate and apart from that if you want
8 something just to be withdrawn from the record and not
9 part of the Court's record, I think you can do that,
10 but the downside of that it's no longer part of the --
11 my view of it --

12 MS. HOCHMUTH: Right.

13 THE COURT: -- anyway -- it's no longer
14 part of the record for appeal.

15 MS. HOCHMUTH: I think we were
16 instructed by the clerk -- and we can certainly go back
17 and do this how ever it's best to be done. But we were
18 told because we actually cite the image number here in
19 the order that what that did is remove the image from
20 the public's view but that this was still part of the
21 Court's file.

22 THE COURT: That is sealing something.
23 And I cannot allow that. Because you're not competing
24 with me, you're competing with the First Amendment that
25 these things are supposed to be public. Okay?

1 So if you want to seal something, which
2 is effectively that, then you need to go through that
3 process. Which you can do. You're welcome to, and
4 then we can seal it. But it's just a matter of notice
5 and a hearing. You've got to file something with the
6 clerk and they put it on -- literally put it up on a
7 bulletin board over in the Family Law Center in the
8 lobby for public notice. And then after, I think it's
9 14 days at least or something, then we can have a
10 hearing or you can set it for submission and it can be
11 sealed. That's one option.

12 The other option I think is inconsistent
13 with that, which is that's not part of the record
14 anymore.

15 MR. HOLTON: Your Honor, the particular
16 report is fundamental to the motion. Would you still
17 be in a position to consider it?

18 THE COURT: Yes. As long as it's --
19 this comes up all the time in this context. You don't
20 want something to be filed -- it's like you never filed
21 this with the Court.

22 MR. HOLTON: Yes, sir.

23 THE COURT: Or the clerk. Then what you
24 would typically do is say by agreement we're filing
25 this document as in-camera, confidential, for Court's

1 eyes only. And yes, the Court can consider it as part
2 of the motion, it's just not part of the Court's file.
3 So that in the future if it becomes an issue on appeal
4 then you would need to have some language in your Rule
5 11 Agreement that says, We're not going to file this
6 with the Court because it's confidential and we're
7 worried about everybody seeing it but we also need to
8 -- it is part of the operative facts here for this
9 motion, so we need to by agreement agree that if this
10 matter is appealed and it's pertinent to the appeal,
11 then it will be presented to the court of appeals as
12 though it were part of the record. Something along
13 those lines.

14 MR. HOLTON: Thank you, Judge.

15 THE COURT: I'm just not going to let
16 you seal something without going through the process
17 for sealing it.

18 MR. HUNT: We would file it in-camera
19 for your review if you'd like us to.

20 THE COURT: Yeah. That's the short
21 answer, yeah. Do whatever you want with respect to
22 start position. Separate and apart from that, feel
23 free to submit it in-camera as an exhibit that's not
24 filed of record.

25 MR. MISHKIN: Thank you, Your Honor.

1 MR. HOLTON: Thank you very much.

2 THE COURT: And if that becomes an issue
3 because you can't agree that the Court should consider
4 it, even though it's not actually filed as part of the
5 record, then I don't know, file the appropriate motion
6 and I'll deal with that.

7 MR. HOLTON: We actually get along
8 pretty well most of the time. I think we'll be okay.

9 THE COURT: So I'll look for your order
10 by the end of the week. Circulate it and get
11 everybody's signature, at least as to form, and we'll
12 proceed.

13 MR. MISHKIN: That'll be fine, Your
14 Honor.

15 MR. HOLTON: Thank you very much, Judge.

16 THE COURT: All right. Thank you. Have
17 a nice afternoon.

18 (Recessed)

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25

1 THE STATE OF TEXAS)

2 COUNTY OF HARRIS)

3
4 I, Carolyn Ruiz Coronado, Official Court Reporter
5 in and for the 151st District Court of Harris County,
6 State of Texas, do hereby certify that the above and
7 foregoing contains a true and correct transcription of
8 all portions of evidence and other proceedings
9 requested in writing by counsel for the parties to be
10 included in this volume of the Reporter's Record, in
11 the above-styled and numbered cause, all of which
12 occurred in open court or in chambers and were reported
13 by me.

14 I further certify that this Reporter's Record of
15 the proceedings truly and correctly reflects the
16 exhibits, if any, admitted, tendered in an offer of
17 proof or offered into evidence.

18 I further certify that the total cost for the
19 preparation of this Reporter's Record is \$60.00 and
20 will be paid by Ms. Farrell Hochmuth, BAKER LAW.

21 WITNESS MY OFFICIAL HAND this the 1st day of
22 October, 2014.

23 /s/Carolyn Ruiz Coronado

24 Carolyn Ruiz Coronado, Texas CSR#7113

25 Expiration Date: 12/31/2014

Official Reporter, 151st District Court

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